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8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 In re

12 HYPERIKON, INC.

13 Debtor
14

Bankruptcy Case No. 21-01776-LT-7

**OPPOSITION TO EMERGENCY
MOTION**

15 TRUSTEE, LEONARD J.
16 ACKERMAN'S MEMORANDUM OF
17 POINTS AND AUTHORITIES IN
18 OPPOSITION TO SREIT 4820
19 INDIANAPOLIS DRIVE, LLC'S
20 EMERGENCY MOTION FOR
21 UNDER SECTION 365 OF THE
22 BANKRUPTCY CODE

23 Date: May 27, 2021

24 Time: 2:00pm

25 Dept.: 3

26 Judge: Taylor

27 Leonard J. Ackerman, Trustee, hereby files the following Memorandum of
28 Points and Authorities in Opposition to SREIT 4820 Indianapolis Drive, LLC's,
(Movant's) motion for emergency relief under Section 365:

1 I. INTRODUCTION

2 The Movant's motion is meritless, is not supported by evidence in many
3 critical respects and constitutes a blatant abuse of the emergency motion
4 procedures. Accordingly, not only should the motion be denied, the Trustee should
5 be awarded sanctions under Bankruptcy Local Rule 9013-9, in an amount to be
6 proven up a later date, by motion.
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9 II. MOVANT HAS WHOLLY AND COMPLETELY FAILED TO
10 ESTABLISH ANY EMERGENCY

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12 There is no emergency here, and the Movant not only has failed to
13 establish any emergency, it has presented as "fact", without evidence, things that
14 are simply untrue and that were known, or should have been known, to Movant,
15 very readily.
16

17 Movant devotes just 7 lines to describing the "emergency" which, in total,
18 amounts to the simple assertion that rent from the subtenant is due June 1, 2021.
19 (Doc. 18, ¶ 37). That is it. That is the emergency. The petition was filed April 30,
20 2021. Movant has offered no evidence that the Trustee has received any rent
21 from the subtenant for the May 1st subrent. In fact, The Trustee did not receive the
22 May rent from the subtenant, as it was apparently paid to the Debtor, early and
23 pre-petition. [See, Ackerman Dec., filed concurrently herewith, filed in Opposition
24 to Movant's Emergency Motion under Section 365, ¶ 3(h)]. The Trustee has not
25 yet been able to trace funds to see if the rent was among the funds turned over to
26 him by the Debtor's bank. [Ackerman Dec. ¶ 3(h)], but he certainly did not receive
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1 any post-petition rent from the subtenant. The Debtor listed no secured creditors
2 on its schedules, but Trustee's counsel has located several UCC Financing
3 Statements, including one in favor of the US Small Business Administration.
4 [Ackerman Dec. ¶ 3(g)], . The Debtor listed the US Small Business Administration
5 on its schedules as a disputed general unsecured creditor in an amount in excess of
6 \$400,000.). The Trustee is in the process of determining if the financing statement
7 is valid and, if valid, if it reaches any of the funds that the Trustee presently holds.
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10 Counsel for the subtenant has informed the Trustee that he has instructed his
11 client to reserve the sublease rent due June 1, 2021 and all subsequent rents, until
12 the issues over the lease and sublease are resolved. [Ackerman Dec. ¶ 3(j)].
13

14 Trustee also is informed and believes that counsel for the Movant has been
15 in contact with counsel for the subtenant. There is simply no emergency here. Even
16 if the Trustee were receiving rent from the subtenant, there would still simply be
17 no emergency. There is no allegation that the Trustee would dissipate those rentals.
18 Even if, in fact, sublease rent were being paid to the Trustee, Movant has cited no
19 authority or case law, showing that such circumstances would give rise to an
20 "emergency" motion for performance by the Trustee under Section 365 or for
21 adequate protection.
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24 III. THE MOTION, SUBSTANTIVELY, IS WITHOUT MERIT

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26 The motion is without merit for a number of reasons.

27 Section 365 (d)(3) provides, as follows:
28

1 “(3)The trustee shall timely perform all the obligations of the
2 debtor, except those specified in section 365(b)(2), arising from and
3 after the order for relief under any unexpired lease of nonresidential
4 real property, until such lease is assumed or rejected, notwithstanding
5 section 503(b)(1) of this title. *The court may extend, for cause, the*
6 *time for performance of any such obligation that arises within 60 days*
7 *after the date of the order for relief, but the time for performance shall*
8 *not be extended beyond such 60-day period.* This subsection shall not
9 be deemed to affect the trustee’s obligations under the provisions of
10 subsection (b) or (f) of this section. Acceptance of any such
11 performance does not constitute waiver or relinquishment of the
12 lessor’s rights under such lease or under this title.”

13 (emphasis added).

14 The only two obligations in dispute within this 60 day period are the May
15 rent, which was due the day immediately following the filing of the petition, and
16 the June rent, which is due shortly. The Trustee submits that good cause exists to
17 grant the Trustee the permissible 60 day extension to June 29, 2021. The Trustee
18 could not possibly pay rent the day after the petition was filed. Even if he did have
19 funds on hand- and he had none- he would need time to review to obtain and
20 review the lease and determine if any monies were owing. The June rent is not yet
21 due, but the subtenant has indicated it intends to reserve that rent.

22 As noted in the Trustee’s declaration, his counsel has discovered a UCC-1
23 Financing Statement in favor of the US SBA which may cover the funds the
24 Trustee has on hand. Under all of the circumstances, good cause exists to grant the
25 Trustee until June 29, 2021 to perform under Section 365(d)(3), even if an
26 emergency motion were otherwise warranted.

1 The Trustee submits that issues as to late fees, interest and attorneys fees are
2 not properly handled on emergency basis, and should be the subject of a separate,
3 fully developed motion at a later date.
4

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6 IV. AS TO THE REQUEST FOR ADEQUATE PROTECTION
7 , THE MOTION IS WITHOUT MERIT BECAUSE THE
8 MOVANT IS ALREADY ADEQUATE PROTECTED
9

10 The Movant's request for adequate protection is not warranted. The Trustee has
11 not received rents from the Subtenant and the Subtenant indicates it will reserve
12 future subrents. The Trustee would be happy to provide Movant with information as
13 to the reserve when it is established. Accordingly, adequate protection is already
14 provided by the Subtenant's willingness to reserve all future rent payments and by
15 Movant's apparent retention of the the Debtor's security deposit in the amount of
16 \$47,073.59 (Doc. 1, p. 9).
17

18 Finally, the Trustee notes, in passing, that the Movant's two emergency motions
19 seem to contradict one another. On the one hand, the instant motion asserts that
20 "[t]here is no dispute that the lease is unexpired." (Doc. 18, ¶ 24, l. 14). On the
21 other hand, the relief from stay motion asserts that the lease was terminated.
22 (Doc.19-1, ¶ 18). Both assertions cannot be correct. The Trustee does not believe
23 the lease was terminated. Some of the factual inaccuracies and evidentiary
24 concerns in Movant's instant motion are highlighted in these papers. Some of the
25 factual inaccuracies in the relief from stay motion are highlighted in the Trustee's
26 response to that motion, filed concurrently herewith.
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1 In the interests of judicial economy, the Trustee's opposition to each of
2 Movant's emergency motion are incorporated in the other opposition by
3 reference.
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5 V. TRUSTEE IS ENTITLED TO SANCTIONS AGAINST MOVANT
6 UNDER LOCAL BANKRUPTCY RULE 9013-9
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8 The Trustee is entitled to sanctions from Movant under Bankruptcy Local
9 9013-9. Bankruptcy Local Rule 9013-9(i) is entitled "Emergency Motions" and
10 subsection (i) provides, in full, as follows:
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12 "(i) Sanctions: If sanctions are appropriate based on improper use of
13 the emergency motion procedure, sanctions may be awarded
14 regardless of the ultimate determination of the merits if later heard as
15 a fully noticed matter."
16

17 For all the reasons cited in Section II, above, sanctions should be awarded to
18 the Trustee, to be determined by motion or declaration at a later date. Trustee
19 suspects that this abuse of the emergency motion procedure may be calculated to
20 put pressure on the bankruptcy estate to sell its rights under the sublease to the
21 Movant, at a below market price.
22

23 VI. CONCLUSION
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25 For all the foregoing reasons, the Trustee respectfully requests that:
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27 a. The motion be denied,
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- 1 b. That the Trustee be provided with the additional 60 days available
2 under Section 365(d)(3) of the Bankruptcy Code, through and
3 including June 29, 2021 to comply with his obligations under Section
4 365(d), and
5
6 c. That the Trustee be awarded sanctions against Movant and its
7 counsel, in an amount to be proven by subsequent declaration, under
8 Bankruptcy Rule 9013-9, for their abuse of the emergency motion
9 procedure.
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12 Date: May 26, 2021

13 KIRBY & McGUINN, A P.C.

14 By: /s/ Roberta S. Robinson
15 Roberta S. Robinson
16 Proposed Attorneys for Leonard J.
17 Ackerman, Trustee
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